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(32654)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1927, No. 231.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Petitioner,

vs.

NORTHSIDE BELT RAILWAY COMPANY.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief For
TEXAS AND NEW ORLEANS RAILROAD COMPANY.

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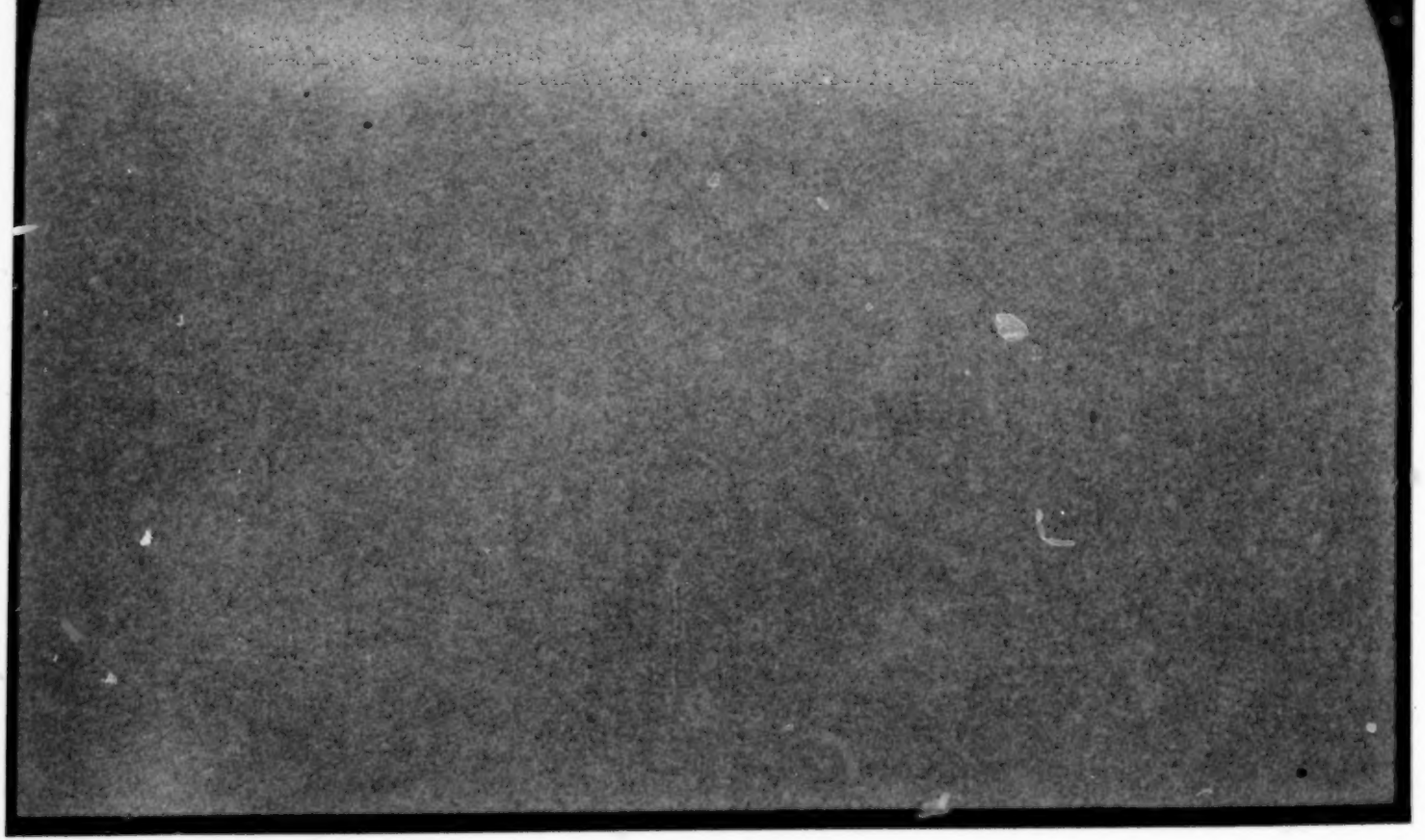

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TEXAS AND NEW ORLEANS RAILROAD COMPANY.

Opinions delivered in this Cause in the Courts below:

Texas and N. O. R. R. Co. v. Northside Belt Ry. Co. (District Court), 8 Fed. (2nd) 153.
Texas and N. O. R. R. Co. v. Northside Belt Ry. Co. (C. C. A.) 16 Fed. (2nd), 782.

Grounds of Jurisdiction.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit, rendered January 8, 1927 (R. 50), which affirmed a judgment of the Dis-

trict Court of the United States for the Southern District of Texas, Houston Division, entered October 6, 1925 (R. 13-14). Said judgment of the Circuit Court of Appeals became final by the overruling of petitioner's motion for rehearing on February 10, 1927 (R. 51). This Court granted the petition (filed April 29, 1927) of Texas and New Orleans Railroad Company, plaintiff and appellant below, for writ of certiorari, June 6, 1927 (R. 51).

The specific claim advanced by petitioner in the Courts below was that the taking of petitioner's property, under a State statute of eminent domain, and the construction, maintenance and operation thereon by Northside Belt Railway Company of a railroad,—said Railway Company being obligated under its charter to engage in interstate commerce, and it being intended and being inevitable that it should engage in such commerce,—without first having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity as provided in Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act, as amended, is in violation of said Interstate Commerce Act and of said paragraphs thereof, and should be enjoined at the suit of the property owner (R. 2-6). The District Court overruled said claim and held that said statute was inapplicable unless and until the new Railroad Company, constructing or owning a railroad wholly within a State should actually have engaged or offered to engage in interstate commerce (R. 10-13).

The same claim was advanced in the Circuit Court of Appeals (R. 17-19). That Court held that because it appeared that, no restraining order or interlocutory injunction having been issued, a judgment condemning the land had been rendered, the railroad constructed across the land involved in the suit, and operation thereof begun, the suit had become a moot one (R. 49-50). This holding was challenged by petitioner in its petition for rehearing,

but the petition was denied (R. 50-51).

Jurisdiction of this court is invoked under Section 240 of the Judicial Code.

Statement of the Case.

The suit was instituted June 13, 1925, in the District Court of the United States for the Southern District of Texas, Houston Division, by Texas and New Orleans Railroad Company, a Texas corporation and a common carrier subject to the Interstate Commerce Act, as plaintiff, against Northside Belt Railway Company, a Texas Corporation created and organized for the purpose of operating a terminal railroad wholly within the State of Texas as a common carrier of freight for hire, as defendant, to enjoin and restrain the defendant, which was engaged in the construction of a railroad without having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity in accordance with Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act from (1) condemning under a State statute, for the purposes of its incorporation, certain land, the property of plaintiff, (2) constructing its railroad on said property, (3) maintaining and (4) operating said railroad on said property. It was alleged in the bill for injunction that the railroad of the Northside Belt is not a spur, industrial, team, switching or side track, nor a street, suburban or interurban electric railway within the purview of Paragraph (22) of Section 1 of said Act. Plaintiff is expressly empowered to maintain this suit as a party in interest by Paragraph (20) of Section 1 of the Act. Plaintiff, in addition to its prayer for a perpetual injunction, prayed, with appropriate allegations, for a temporary restraining order (R. 2-6).

The Court refused to enter a temporary restraining order, and having set the matter down for hearing, denied the prayer for an interlocutory injunction. At this time

a report had been filed by the commissioners in condemnation, awarding damages for the condemnation of the land, and Texas and New Orleans Railroad Company had appealed from said award in accordance with the terms of the State statute. The railroad of the Northside Belt was thereupon hurriedly built on petitioner's land, and completed across it about 11 p. m. on the date of institution of the suit (R. 21).

The Northside Belt filed its answer on July 15, 1925, admitting that it is a railroad corporation created under the General Laws of the State of Texas, having the corporate power and for the purpose of constructing, owning, maintaining and operating a terminal railway wholly within Harris County, Texas, asserting its right under the laws of Texas to condemn said property for the purposes of its incorporation, and, that it had constructed its railroad thereon after institution of the suit, alleging that it is solely an intrastate railroad company not yet engaged in business, and is not subject to the Interstate Commerce Act (R. 7-10).

The case was tried on its merits and full proofs taken on July 15, 1925 (R. 13). On September 26, 1925, the District Court filed its opinion (R. 10-13) denying the application for an injunction and dismissing the bill on the ground that a newly created railroad company whose line lies wholly within a State has the right to acquire property by condemnation, to build its railroad, to maintain it, and to operate it without regard to the Federal Statutes, and becomes subject to said Statutes only after it has actually engaged or offered to engage in interstate commerce. Decree was entered accordingly (R. 13-14).

The evidence without conflict disclosed that the Northside Belt is incorporated as a common carrier to operate a railroad in Harris County, Texas, (R. 32-36) and, as such, was created for the purpose and charged with the duty of transporting interstate as well as state commerce;

that, as shown by the testimony of its President, it was intended and designed to engage in interstate commerce, and that it must inevitably engage in interstate commerce as soon as it engages in any commerce at all (R. 25, 26 and 28). No certificate of public convenience and necessity, in accordance with the terms of the Federal Statute, has been applied for or obtained by it (R. 36-37). It disclosed that the Northside Belt had, on June 8, 1925, instituted a suit under the Texas statute for the purpose of condemning a right of way across the property of Texas and New Orleans Railroad Company described in the bill; that immediately prior to the filing of said bill commissioners, appointed under the Texas statute, had fixed the damages of petitioner for the taking of its said property; that the amount required by the State law had been deposited by the Northside Belt with the Clerk of the Court in which the condemnation suit was pending, a bond required by the State law had been filed, and that the Northside Belt had thereby acquired such right as it could solely under the State statute to take possession of said land. That after the filing of the bill, and with notice thereof, the Northside Belt had taken possession of said land and under cover of night had constructed its railroad across same. That petitioner had taken an appeal under the State statute from the award above referred to (R. 21). In this appeal the petitioner is entitled to trial *de novo* in the County Court of Harris County, Texas. There is no evidence that the Northside Belt has ever operated its railroad over said property. On the contrary, all the evidence is to the effect that it has not (R. 27).

Plaintiff applied to the District Court for a restraining order to remain in effect pending its appeal (R. 14-15) but said application was denied (R. 16). An appeal was thereupon taken to the Circuit Court of Appeals for the Fifth Circuit (R. 16-20).

The Circuit Court of Appeals affirmed the judgment of the Court below, holding that the suit had become moot (R. 49-50).

Petitioner, in due time, on April 29, 1927, filed and presented to this Court its petition for a writ of certiorari and brief in support of same, which said petition was granted on June 6, 1927.

Specification of Assigned Errors here Intended to be Urged.

1. The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character (R. 18).

2. The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business (R. 18).

3. The decree is contrary to law (R. 19).

4. The cause has not become moot.

Summary of Argument.

1. Since May 28, 1920, that is, ninety days after the taking effect of Paragraphs (18) to (22) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, no carrier by railroad, subject to said Act, may lawfully undertake the extension of its line of railroad, or the construction of a new line of railroad, or acquire or operate any line of railroad or extension thereof, or engage in transportation under the Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction

or operation, or construction and operation of such additional or extended line of railroad.

2. Texas and New Orleans Railroad Company, being a party in interest, that is, the owner of land sought to be condemned and used for the construction, maintenance and operation of the railroad of the Northside Belt, may enjoin in any court of competent jurisdiction such unlawful construction, maintenance and operation. The District Court of the United States for the Southern District of Texas, Houston Division, is a court of competent jurisdiction, inasmuch as the suit is one arising under the Constitution and Laws of the United States, and the domicile of the defendant, Northside Belt, is at Houston, in said Southern District of Texas.

3. Under the Commerce Clause of the Constitution, the Congress has power to regulate commerce with foreign nations, among the several states, and with the Indian tribes; and this power is unlimited, except as prescribed by the Constitution itself. Included in this power is the right to restrict and to regulate the construction and operation of railroads, both state and interstate, which are chartered, as common carriers, to engage in interstate as well as state commerce, which must of necessity engage in all such commerce; as well as to restrict and regulate the construction and operation of railroads if there be, or can be any such, which, though wholly within a state and with the right and duty to engage solely in state commerce, may, by depriving railroads engaged in both interstate and state commerce of part of their business, thereby impose a burden on interstate commerce.

4. The Congress has exercised this power in the enactment of the Interstate Commerce Act and the amendments thereof contained in the Transportation Act, 1920.

5. The Northside Belt is incorporated under the Laws of the State of Texas as a common carrier, is

charged with all the duties and obligations of such common carrier by the law of its creation, including the duty to receive and transport all business, interstate as well as state, which may be tendered it for transportation. It was designed and created for the purpose of engaging in interstate commerce as well as state commerce, and it must inevitably engage in interstate commerce as soon as it engages in any commerce at all. It is, therefore, subject to the Interstate Commerce Act, and is engaged in interstate commerce within the meaning of the Act.

6. The purpose of the Interstate Commerce Act, as amended, is affirmatively to build up a system of railways prepared to handle promptly the interstate traffic of the country, to enable the owners of the railways to earn enough to maintain their properties in such a state of efficiency that they can carry well this burden. To construe the Act as permitting the construction of railroads indiscriminately within the boundaries of States without regard to public convenience and necessity will defeat the purpose of the Act. The Act should be so construed as to effect its purpose.

7. Departmental construction of Federal Statutes is entitled to great weight. The Interstate Commerce Commission has construed this Statute and has continuously asserted its jurisdiction to give or withhold its permission for the construction of new railroads wholly within State lines.

8. The case is not moot. Everything that has been done by the Northside Belt was done in the face of the Statute and in the face, and with full knowledge, of this suit. The work of construction which has been done should be undone. Operation has not been begun and should be prevented.

Argument.

I.

Prior to the enactment of the Transportation Act, 1920, the Congress was principally concerned in the regulation of interstate commerce and its instrumentalities in preventing abuses, particularly those arising from excessive or discriminatory rates. With the passage of said Act, there was introduced into the Federal legislation a new railroad policy, the ensuring of adequate transportation service. To attain it, new rights, new obligations and new machinery were created (*New England Divisions Case*, 261 U. S. 184, 189-190).

In order to ensure adequate transportation service, the Congress charged the Interstate Commerce Commission with the duty of determining, to the end that unnecessary railroads might not be built or operated, whether or not, in any case, the public convenience and necessity required, or would require, the construction or operation of new lines and extensions of existing lines; and with the duty of determining whether or not the public convenience and necessity permitted the abandonment of existing lines of railroad. This purpose was accomplished by the enactment of Paragraphs (18) to (22), inclusive, of Section 1, of the Interstate Commerce Act, as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require

or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than

such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to

the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

It is apparent that the foregoing provisions are applicable to all common carriers by railroad in the United States and that no railroad, or any part thereof, may be constructed or abandoned without a certificate of public convenience and necessity granted by the Interstate Commerce Commission, save and except industrial, team, switching or side tracks located or to be located wholly within one state, and street, suburban or interurban electric railways, which are not operated as a part or parts of a general railroad system of transportation (*Colorado v. United States*, 271 U. S. 153, 164).

II.

Without having complied or attempted to comply with the requirements of the law, the Northside Belt, which was incorporated under the laws of the State of Texas as a common carrier by filing its articles of incorporation in the office of Secretary of State of the State of Texas on March 23, 1925, instituted a condemnation suit under the State statute against Texas and New Orleans Railroad Company for the purpose of condemning, for the purposes of its incorporation, that is: for the construction, maintenance and operation of its line of railroad, certain land, the property of Texas and New Orleans Railroad Company. The domicile of the Northside Belt is in the City of Houston, in the Southern District of Texas. In Paragraph (20) of the Act above set out it is provided

that any construction or operation contrary to the provisions of that Paragraph or of Paragraphs (18) or (19) of said Act may be enjoined by any court of competent jurisdiction at the suit of any party in interest. There can be no doubt that the owner of the property sought to be taken for the purpose of unlawful construction and operation of a railroad is a party in interest within the meaning of the Statute. It is so held in *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 285 Fed. 540, 548. Accordingly, this suit was instituted in the District Court of the United States for the Southern District of Texas, Houston Division. Neither the jurisdiction of that Court, nor the right of Texas and New Orleans Railroad Company as a party in interest to maintain the suit have been challenged.

III.

In Article I, Section VIII, of the Constitution of the United States it is provided:

"The Congress shall have power—

* * *

"3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

* * *

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

In *Gibbons v. Ogden*, 9 Wheaton, 1, it was held by this Court that this power is unlimited except as prescribed by the Constitution itself. That commerce is more than traffic, it is commercial intercourse between nations and parts of nations in all its branches.

In *California v. Pacific Railroad Company*, 127 U. S. 1, 39, quoted with approval in *Dayton-Goose Creek Rail-*

way Company v. United States, 263 U. S. 456, 479, this Court has said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

And this Court has held in *Houston East and West Texas Railway Company v. United States* (the *Shreveport case*), 234 U. S. 342, that wherever the interstate and state transactions of carriers are so related that the government of one involves the control of the other, it is Congress and not the State that is entitled to prescribe the final and dominant rule.

IV.

That Congress has exercised this plenary power so as to deal with almost the entire field of transportation by railroad, in which interstate and state commerce are inextricably commingled, is demonstrated by the terms of the Transportation Act, 1920, and by the following decisions of this Court rendered after the passage of that Act and with respect to many of its provisions.

In the first case decided by this Court under the amended Act, *Wisconsin Railroad Commission vs. C. B. & Q. R. R. Co.*, 257 U. S. 563, the Court, after reviewing some of the changes in the law brought about by the passage of the Act, said:

"It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill.

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates', i. e., powers derived from previous amendments

to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words. . . . . (pp. 585-586).

"It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce,

such incidental regulation is not an invasion of state authority or a violation of the proviso. . . . . (p 588)

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field.

"In *Minnesota Rate Cases*, 230 U. S. 352, where relevant cases were carefully reviewed, it was said, p. 399: 'The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that

the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.' " (pp. 589-590)

In *New England Divisions Case*, 261 U. S. 184, the Court said:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what traffic would bear. A five per cent. increase had been granted in 1914, *Five Per Cent. Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent. in 1917, *Fifteen Per Cent. Case*, 45 I. C. 303; twenty-five per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tol-

erate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line." (pp. 189-191).

Dayton-Goose Creek Railway v. United States, 263 U. S. 456, involved the validity of the recapture provisions of the Transportation Act, 1920 (Section 422 of that Act, which added Section 15a to the Interstate Commerce Act). In that case the Court said:

"This Court has recently had occasion to construe the Transportation Act. In *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had, by Sections 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the *New England Divisions Case*, 261 U. S. 184, it was held that

under Section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

"In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issues of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to

the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball*, 10 Wall. 557, 564; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *California v. Pacific R. R. Co.*, 127 U. S. 1, 39; *Wilson v. Shaw*, 204 U. S. 24, 33; *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529. Mr. Justice Bradley, speaking for the Court in *California v. Pacific R. R. Co.* (p. 39), said:

" 'The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. . . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject.'

"If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service. . . . . (pp. 477-479)

"In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise

such control has been clearly established. *Minnesota Rate Cases*, 230 U. S. 352, 432, 433; *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 477; *The Shreveport Case*, 234 U. S. 342, 351; *Illinois Central R. R. Co. v. State Public Utilities Comm.*, 245 U. S. 493, 506; *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable." (p. 485)

In *Railroad Commission of California v. Southern Pacific Company, et al*, 264 U. S. 331, the Court had before it the validity and effect of paragraphs (18) to (21) of Section 402 of the Transportation Act, 1920, which have become the same paragraphs of Section 1 of the amended Interstate Commerce Act. In that case the Railroad Commission of California had entered certain orders undertaking to require the establishment of a new union passenger station at Los Angeles by several interstate carriers, involving the abandonment of their separate stations, extensive changes in relocations of their main tracks, and very great expense. The Court held that this could not be brought about either by voluntary action of the carriers or by order of a state commission in the absence of a certificate of the Interstate Commerce Commission under the Statute just mentioned. The Court, after quoting with approval from the *Dayton-Goose Creek Case*, said:

"It is obvious . . . that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. . . . . This is a drastic limitation of a carriers' control and use of its own property in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. . . . ." (pp. 343-344)

Texas & Pacific Railway Company v. Gulf, Colorado and Santa Fe Railway Company, 270 U. S. 266, also involved the paragraphs of the Transportation Act above referred to. In this case the Court said:

"By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses. . . . . (pp. 277-278)

"For invasion through new construction of territory

adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction." (pp. 278-289)

In the Courts below the Northside Belt referred to and relied on the decision of this Court in *State of Texas v. Eastern Texas Railroad Company,* 258 U. S. 204, as supporting the view that the provisions of the Transportation Act and amended Interstate Commerce Act here relied on have no application to carriers lying wholly within a State, and also that a common carrier whose facilities lie wholly within a State may lawfully devote itself to the transportation solely of state commerce to the exclusion of interstate commerce. The effect of this decision, in so far as material in this connection, is simply that the Statute is not to be construed as clothing the Interstate Commerce Commission with authority over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce will not be affected by that business (p. 218).

This Court, nevertheless, held in *Railroad Commission of Texas v. Eastern Texas Railroad Company,* et al, 264 U. S. 79, that such railroad, having been authorized by the Interstate Commerce Commission pursuant to the

Statute to cease operation with respect to interstate business, and its purely state business being insufficient to justify continued operation, might lawfully abandon and take up its line.

Colorado v. United States, 271 U. S. 153, involved the abandonment under authority of the Interstate Commerce Commission granted pursuant to the terms of the Act of a branch line of railroad lying wholly within the State of the owning company's incorporation, when continued operation would result in large deficits, constituting undue burden on interstate commerce. In that case this Court sustained absolutely the validity of the Act and the power of the Commission under it, saying:

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry. v. Tennessee,* 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad*

Commission v .Southern Pacific Co., 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

"This railroad, like most others, was chartered to engage in both intrastate and interstate Commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co. v. United States*, 222 U. S. 20; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks located . . . wholly within one State.' See *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., supra.* But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

"Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive juris-

diction conferred upon the Commission by Section 20a over the issuance of securities. Compare *Venner v. Michigan Central R. R. Co., ante,* p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry. v. United States,* 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission v. Goodrich Transit Co.,* 224 U. S. 194. And upon it rests likewise the power exerted by this Court in setting aside the state regulations involved in *Union Pacific R. R. Co. v. Public Service Commission,* 248 U. S. 67, and *St. Louis & San Francisco Ry. Co. v. Public Service Commission,* 254 U. S. 535. See also *United States v. Ferger,* 250 U. S. 199; *Stafford v. Wallace,* 258 U. S. 495; *Chicago Board of Trade v. Olsen,* 262 U. S. 1.

"The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R. R. Co.,* 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States,* 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate serv-

ice must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." (pp. 163-166).

It is submitted that every word in the foregoing extract from the opinion of this Court,—changing only "abandonment" to "construction", applies to the present case, and speaks louder than a trumpet against the decisions of the courts below.

The contention that a common carrier by railroad, created and obligated by the very law of its existence to transport interstate commerce, designed and intended by its creators to transport interstate commerce and which must inevitably transport interstate commerce, is not engaged in interstate commerce or subject to the Act until it shall actually have transported such commerce is completely destroyed by the provisions of Paragraphs (1) and (7) of Section 6 of the Interstate Commerce Act as Amended.

Paragraph (1) provides: "That every common carrier subject to the provisions of this act, shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other common carrier by railroad, by pipe line or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route

shall file, print and keep open to public inspection as aforesaid the separately established rates, fares and charges applied to the through transportation. . . . ."

Paragraph (7) provides: "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge, or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time. . . . . ."

If the view of the defendant and of the courts below that no carrier whose line is situated wholly within a state becomes or can become subject to the act until it shall actually have transported some article in interstate commerce is correct, then the foregoing provisions are meaningless.

V.

The Northside Belt is incorporated under the laws of the State of Texas as a common carrier. Article X, Section 2, of the Constitution of Texas provides:

"Railroads heretofore constructed, or which may hereafter be constructed, in this State are hereby declared public highways, and railroad companies common carriers."

A terminal railway company, such as the Northside Belt, being a common carrier, is charged by law with the duty of discharging to the public and to other railroad companies all the duties of a comman carrier (*Houston Belt & Terminal Railway Company v. Hamburger*, 143 Southwestern Reporter, 272)."

All railroad companies created under the laws of Texas, are, as are common carriers generally under the common law, charged by the law of their creation with the duty of receiving and transporting all freight tendered them, without regard to its interstate or state character.

Article 6407, Revised Statutes of Texas, 1925 (Act of 1887, page 110, Gammel's Compiled Laws of Texas, Volume 9, page 908), provides:

"All railway companies doing business in this State shall be and they are hereby required to receive from all railway companies with which they may connect at the State line of this State, or at any place within this State, or at any or all places where they may cross the line of any other railway doing business, or operating a line of railway in this State, all freights and passengers coming to it from such connecting line, and destined to points on its line, or to points beyond its line or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received, and upon the same terms and conditions with those made by such line for like or similar service against any other railway in or out of this State with which it does business. . . . ."

This enactment is in truth merely declaratory of the common law. It is not, as has been contended by some, void in so far as it relates to interstate commerce. It creates no burden on interstate commerce. Reasonably construed, it requires merely that railroad corporations of the State shall take whatever steps may be necessary under the Federal law to enable them to comply with

the requirements of the State statute, and with their common law duty.

May a State by act of its legislature provide that railroad companies incorporated under the laws of the State shall not connect at the State boundaries or elsewhere with railroads incorporated under the laws of the United States or of other States or engaged in interstate commerce? Beyond question, no. May a State provide that railroad companies incorporated under its laws shall not receive or transport interstate commerce? Unquestionably, no. It, therefore, follows that since a State may not lawfully forbid a railroad company of its creation to engage in the transportation of interstate commerce, it may require it to do so, subject always to such regulation as may be imposed by Congress. The State of Texas has imposed this duty on its creatures.

The Northside Belt was created to engage in interstate commerce as well as in state commerce. It could not under the law of Texas nor, it is believed, under the laws of the United States have been created for the sole purpose of engaging in the transportation of state business. It is disclosed by the record without conflict that it was designed by its creators to engage in interstate as well as state commerce and that it inevitably must engage in interstate commerce as soon as it shall engage in any commerce at all. It is, therefore, engaged in interstate commerce, and subject to Federal regulation from the moment of its creation and, in truth and in fact, is, and was from the moment of its creation, a common carrier, subject to the Interstate Commerce Act.

VI.

The purpose of the Interstate Commerce Act as amended, affirmatively to build up a system of railways

prepared to handle promptly the interstate traffic of the country and to enable the owners of the railways to earn enough to maintain their properties in such a state of efficiency that they can well carry the burden is, under the terms of the Act, to be accomplished in part by preventing the construction and operation of new railways and extensions of existing railways not required by the convenience and necessity of the public. The Congress recognized that more railroads will not create more traffic, but on the contrary, will bring about the division of existing traffic among more claimants of a share of it.

The purpose of paragraphs (18) to (22) of section 1 of the Act is clearly to prevent the unnecessary multiplication of mouths to be fed from the whole traffic of the country, state and interstate, inextricably commingled. If it were possible, and we submit that it is not, that common carriers could be created by states for the sole purpose of engaging in state commerce, to the exclusion of interstate commerce, the construction and operation of such lines would adversely affect the existing carriers engaged in transporting interstate commerce and the whole commerce of the country, just as surely and almost as much as though the new carriers were authorized to engage and did engage in the transportation of interstate and state commerce alike.

Is it conceivable that the Congress, intending to build up a system of railways adequate to handle promptly and efficiently the interstate traffic of the country and to earn enough to maintain themselves in a state of proper efficiency, has permitted it to be possible that, under state authority alone, every existing interstate railroad in every state may be paralleled, its state business taken away from it, and it so crippled as to be incapable of discharging the great duties imposed upon it? Is it possible that this Court will so construe the

Act of Congress as to ignore its plain purpose, and to render nugatory its effort to create and support an efficient transportation system? To do so will be to pursue the shadow and to ignore the substance.

VII.

The Interstate Commerce Commission has continuously asserted its jurisdiction under the Interstate Commerce Act to give or withhold its permission for the construction of new lines wholly within the boundaries of a state, and that jurisdiction has not hitherto been challenged.

Application of Michigan Northern R. R., 65 I. C. C. 480.

Application of Coon Bayou & Arkansas City Ry. 65 I. C. C., 701.

Application of Uvalde & Northern Ry. Co., 67 I. C. C. 204; 67 I. C. C. 554.

Application of Golden Belt R. R. of Kansas, 67 I. C. C. 370.

Application of Golden Belt Ry. (Application denied) 71 I. C. C., 233.

Application of National Line R. R. Co. (Application denied) 71 I. C. C. 556.

Application of Shreveport & Northeastern R. R. (Application denied) 71 I. C. C. 586.

Construction of line by Jefferson & Southwestern Ry. (Application denied) 76 I. C. C. 778.

Application of Longview, Portland & Northern, 79 I. C. C. 805.

Construction of line by Mississippi Ry., 82 I. C. C. 698.

Administrative practices by government departments, long adhered to, are given weight by the courts in determining the proper interpretation to be placed upon a statute.

In Kern River Company vs. U. S., 257 U. S., 147, Mr. Justice Van Devanter, speaking for the Court, said:

"Even if the meaning of a Federal Statute were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it." Citing Logan vs. Davis 233 U. S. 613, in which the Court referred to: 'The settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons.'

VIII.

It is submitted that the United States Circuit Court of Appeals erred in holding that all issues presented in the bill of complaint had become moot. The Court said:

"It is disclosed by the record that no restraining order or interlocutory injunction was issued and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which had been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done."

The undisputed facts, as disclosed by the record, are: On or about the 8th day of June, 1925, the Northside Belt duly filed proceedings for the purpose of condemning a right of way across the land of petitioner; that such proceedings were duly prosecuted, resulting in an award to complainant of $750.; that following the condemnation proceedings, respondent deposited with the County Clerk of Harris County, Texas, the sum of

$1,500., double the amount of the award, and became entitled, under the State statute, to take possession of the land in question on the 13th day of June, 1925.

Immediately following the award of the commissioners, petitioner gave notice of appeal, under and by virtue of the statute of the State of Texas, to the County Court at Law of Harris County, Texas, where said condemnation proceedings are now pending, awaiting the final result of this suit. That about the time of the hearing before the Commissioners, petitioner filed and presented to the United States District Judge a bill for injunction, praying that respondent be temporarily and, on hearing, perpetually restrained from prosecuting its condemnation suit, as well as from constructing, maintaining, and operating its railroad over and across the land of petitioner; that the United States District Judge refused to grant a temporary injunction, but set the case down for hearing, requiring the Northside Belt to appear within five days and show cause why said injunction should not be granted.

The Northside Belt immediately after being advised of the fact that said temporary injunction had been denied by the court, procured an extra force and built its track over and across petitioner's land, completing same at about 11:00 p. m. on June 13th, 1925.

The condemnation proceeding in the County Court at Law, where it will be tried *de novo*, was pending at the time the case was tried in the United States District Court, and at the time when the opinion was rendered by the United States Circuit Court of Appeals for the Fifth Circuit. It is still pending, and if the relief prayed for herein is granted, must fall, with the powers which the Northside Belt is wrongfully exercising under it. (R. 21-22).

The work of constructing the track, so hurriedly done, may and should be undone.

In 32 Corpus Juris, page 24, Sec. 6, the rule is laid down as follows:

"Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescence or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case."

In *St. Louis & S. F. R. R. Co. v. Cross*, 171 Federal, 480, it was held:

"It is also insisted in support of the demurrer that the defendant Meyer actually made the declaration against the complainant, revoking its authority in the state. In the amended bill it is alleged that the signing of the instrument was 'subsequent to the institution of the suit.' It bears date one day later than that of the filing of the original bill and of the preliminary order restraining its issuance, but on the day of service of the order. Presumably it was executed before the order became effective or was served. It does not appear that 'a foreign domicile' was alleged in the petition for removal or was the ground of the declaration; but assuming that such domicile was alleged, and the fact certified to the Secretary as contemplated in the legislative act, still must the relief prayed for be denied because the declaration shortly preceded the time when the order became effective or was served? The point is highly technical and goes to an avoidance of a decision on the merits. It is not available. This court had acquired jurisdiction over the subject-matter of the suit before the defendant acted, and he

could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample 'power to compel by mandatory injunction the restoration of the former conditions of things,' and prevent the gaining of advantage by reason of the wrongful act. 22 Cyc. 743; *Ex parte Lennon,* 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; High on Injunctions (4th Ed.) Sec. 5a; Bishpam's Prin. Eq. 400; Gibson's Suits in Chancery, Sec. 824. The demurrer will be overruled."

The railroad having been wrongfully and illegally constructed on petitioner's property, its maintenance may be enjoined, and in any event, operation being a continuing act, may be enjoined at any time, even though begun prior to the trial. In fact operation has not yet been begun. *Turney vs. Shriver,* 269 Ill. 164; 109 N. E. 708; *Los Angeles Water Co. vs. Los Angeles,* 88 Fed. 720; *Surrall v. Am. Tel. Co.,* 224 Ill. 266.

That the case is not moot, is shown by the following authorities:

"A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." *Adams v. Railroad Company,* 21 Rhode Island 134.

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. *Ex parte Steele,* 162 Fed. 694, 702."

"The fact that a suit may be a friendly one would not of necessity render it a 'moot case,' which is defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights. *State*

v. First Catholic Church of Lincoln, 128 N. W. 657, 658, 88 Neb. 2."

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights. 'It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy.' *State v. Dolley,* 108 Pac. 846, 82 Kan. 533 (citing *Adams v. Union Railroad Co.,* 42 Atl. 517, 21 R. I. 140, 44 L. R. A. 273; *Ex parte Steele,* 162 Fed. 694, 701.)".

IX.

The Congress in accomplishing its sole objective in the enactment of the statute, the regulation of interstate commerce by fostering and preserving the national system of interstate railroad transportation, has made the Northside Belt subject to the Act:

First, by virtue of the exclusive control by the Congress over interstate commerce and its instrumentalities, because the railway, conceived for the purpose of transporting interstate as well as state commerce, chartered and bound by the law of its creation to transport interstate as well as state commerce, and inevitably destined to transport interstate commerce, is engaged in interstate commerce from the moment of its creation;—

Second, by virtue of the incidental control by the Congress over state operations when they invade the field of the national transportation system, because the railway, proposing to sieze a part of the business and revenue on which the national system depends for support and for the efficient discharge of its great duties, has thrust itself into

the field where the powers of the nation have, and must have, full sway.

The simple expedient of a new charter, and a new railroad, ready and able, in the twinkling of an eye, to sieze upon a part of the revenue of the national transportation system (it matters not whether from state or interstate transportation) cannot avail to thwart the purpose of the supreme authority.

It is respectfully submitted that the decree appealed from should be reversed.

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